

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DIANE D'ANGELO	:	DETERMINATION
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1985	:	
through May 31, 1986.	:	

Petitioner, Diane D'Angelo, 5 Wagner Court, Melville, New York 11747, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1985 through May 31, 1986 (File No. 807053).

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York on May 8, 1990, with all briefs to be filed by June 22, 1990. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly denied petitioner a Conciliation Conference on the basis that the request was untimely.

FINDINGS OF FACT

The Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated September 28, 1987, to petitioner, Diane D'Angelo, which assessed sales and use taxes for the period March 1, 1985 through February 28, 1986 in the amount of \$5,698.63 plus penalty of \$1,670.22 and interest of \$1,504.27 for a total amount due of \$8,873.12. The Division also issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner, dated September 28, 1987, which assessed sales and use taxes for the period March 1, 1986 through May 31, 1986 in the amount of \$4,273.15 plus penalty of \$512.77 and interest of \$108.17 for a total amount due of \$4,894.09. Each of the

notices stated that, as an officer, petitioner was liable for the sales and use taxes due from Fancy Fronts, Inc. The following direction was printed in bold-faced type in the upper-left hand corner of each of the notices:

"THIS DETERMINATION MAY BE CHALLENGED THROUGH A HEARING PROCESS.

NOTE: THIS DETERMINATION SHALL BE FINAL UNLESS AN APPLICATION FOR HEARING IS FILED WITH THE STATE TAX COMMISSION WITHIN 90 DAYS FROM THE DATE OF THIS NOTICE OR UNLESS THE TAX COMMISSION SHALL REDETERMINE THE TAX."

In October 1987, petitioner's debts were discharged in bankruptcy.

On December 10, 1987, petitioner went to the Suffolk District office of the Department of Taxation and Finance and spoke with an employee of the Tax Compliance Division. Since she felt she was not responsible, petitioner tried to find out what she could do about protesting the sales tax assessments. Petitioner also explained that she could not pay the amount sought and that she had filed a petition for bankruptcy. Thereafter, the employee of the Tax Compliance Division made a photocopy of the bankruptcy petition and advised petitioner that the filing for bankruptcy was enough to relieve her of liability.

Petitioner did not file a written protest to the notice, because she relied on the statements by the Division employee that there would be no action by New York State.

About a month after the meeting at the Suffolk District Office, petitioner started receiving notices seeking collection of the amounts in issue. Thereafter, petitioner was told that sales tax was not dischargeable in bankruptcy and that the period for filing a petition had expired.

In a memorandum dated March 28, 1988, petitioner was asked to contact a certain tax compliance representative by April 11, 1988 to make payment arrangements. The notice further stated that **"UNLESS I HEAR FROM YOU BY THE DATE NOTED ABOVE, I WILL FOLLOW WITH WARRANT PROCEEDINGS WHICH MAY INCLUDE INCOME EXECUTION; SEIZURE OF PERSONAL PROPERTY AND LIEN ON REAL PROPERTY."**

On May 31, 1988, warrants were filed in Suffolk County. Subsequently, the Division

issued an income execution dated July 14, 1988. At some juncture, petitioner entered into a deferred payment agreement. These payments continued until November 1, 1988. Petitioner stopped making payments, because she was experiencing financial difficulty.

In a notice dated February 13, 1989, petitioner was advised that since payments had not been made as agreed, the Division had cancelled the deferred payment agreement. However, the notice also stated that the agreement would be reinstated if payments in arrears were made by February 23, 1989. Lastly, petitioner was informed that her failure to make the required payments would result in collection enforcement.

Petitioner mailed a Request for Conciliation Conference dated March 2, 1989. The envelope containing the request was postmarked on March 3, 1989 and was received by the Bureau of Conciliation and Mediation Services on March 6, 1989. In a conciliation order dated March 31, 1989, the Bureau of Conciliation and Mediation Services denied petitioner's request for a conciliation conference since the request was received more than 90 days from the date of the statutory notice.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner argues that she is entitled to a conciliation conference because she responded to the notices within 90 days. Petitioner also submits that she is entitled to a conciliation conference because the reason for the delay was because she was erroneously advised that no further action would be taken by New York State.

It is the Division's position that petitioner's discharge in bankruptcy did not relieve her of liability for the sales taxes in issue. The Division also asserts that petitioner's visit to the Suffolk District Office can not be construed as a timely protest of the notices of determination and that petitioner did not timely file a request for a conciliation conference. Lastly, the Division maintains that petitioner has not disputed the amount of tax due or shown she was not properly assessed.

CONCLUSIONS OF LAW

A. Tax Law § 170.3-a establishes a Bureau of Conciliation and Mediation Services. This section provides, in part, as follows:

"(a) There shall be in the division of taxation a bureau of conciliation and mediation services which shall be responsible for providing conciliation conferences. Such conference shall be provided, at the option of any taxpayer or any other person subject to the provisions of this chapter...where such taxpayer or any other such person has received any written notice of a determination of tax due...or any other notice which gives rise to a right to a hearing under this chapter if the time to petition for such a hearing has not elapsed...." (Tax Law § 170.3-a[a] [emphasis added].)

B. The regulations promulgated pursuant to section 170.3-a provide that:

"The request [for a conciliation conference] must be filed within the time limitations prescribed by the applicable statutory sections for filing a petition for hearing in the Division of Tax Appeals and there can be no extension of those time limitations." (20 NYCRR 4000.3[c].)

C. The applicable statutory sections require a petitioner to file a petition within 90 days of the time the liability is assessed (Tax Law §§ 1138[a][1]; 2006.4). If this time period is not satisfied, the liability becomes "finally and irrevocably fixed" (Tax Law §§ 1138[a][1]; 2006.4).

D. It has been held that oral notification of the desire to have a hearing does not satisfy the requirement of filing a petition (see, Matter of Daniel Leach and Craig Foster D/B/A

Adirondack Builders, Inc., State Tax Commn., December 23, 1986). Therefore, petitioner's meeting on December 10, 1987 at the Suffolk District Office does not constitute the necessary filing of a petition.

E. When the timeliness of a petition is in issue, it becomes incumbent upon the Division to submit evidence establishing both the fact and the date of mailing of the statutory notice (Matter of Winifredo Malpica, Tax Appeals Tribunal, July 19, 1990). Here, there is no evidence such as an authenticated mailing log, a return receipt or evidence of the Division's business or office practice which would establish the date of the mailing of the notice. Since the date stamped on the notice is insufficient to establish the date of mailing (Matter of Winifredo Malpica, supra) it is not possible to ascertain exactly when the 90-day period for filing a petition commences. Nevertheless, petitioner's argument that she went to the Suffolk District Office on December 10, 1987 to protest the notices constitutes an admission that the notices were mailed by at least December 10, 1987. Since no petitions were filed within 90 days of December 10, 1987, it is clear that petitioner did not timely request a hearing.

F. The foregoing analysis, however, does not resolve this matter. The record establishes that the Division first advised petitioner in its notices of determination to file a petition within 90 days. Thereafter, a Division employee told petitioner that her discharge in bankruptcy rendered the petition unnecessary. Subsequently, the Division adopted the position that petitioner was not entitled to a conference because she did not file a timely petition.

G. It is unfortunate that the conflicting positions taken by the Division have worked to petitioner's detriment. Under some circumstances, a series of conflicting statements from the Division can lead to the conclusion that petitioner was entitled to a conference despite the fact that a timely petition was not filed (see, Matter of Eastern Tier Carrier Corporation, Tax Appeals Tribunal, December 6, 1990). On the other hand, a different situation appears to be presented here. In this matter, petitioner's own testimony shows that she became aware that she should have filed a petition in or about January 1988. However, rather than pursuing her challenge, she acquiesced to the assessment and began making payments. It was not until more

than a year after she found out that a petition should have been filed that the request for a conciliation conference was made. It is concluded that the delay involved herein distinguishes this matter from the Eastern Tier Carrier Corporation case and warrants the conclusion that petitioner abandoned her right to a hearing.

H. The petition of Diane D'Angelo is dismissed.

DATED: Troy, New York

1/31/91

ADMINISTRATIVE LAW JUDGE